IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 713

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*,

v.

WALTER KRUEGER

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the district court (R. 12-19) is reported at 137 F. Supp. 806.

JURISDICTION

The judgment of the district court discharging the writ of habeas corpus and remanding Mrs. Smith to petitioner's custody (R. 19-20) was entered on February 2,

1956. Respondent's notice of appeal (R. 20) was filed on February 6, 1956, and the cause was docketed in the court of appeals on February 21, 1956 (R. 21). The petition for writ of certiorari before judgment was filed on February 27, 1956, and was granted on March 12, 1956 (R. 94). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1). See also Supreme Court Rule 20.

QUESTION PRESENTED

Whether a civilian woman, the dependent wife of an officer in the Army, may constitutionally be tried by court-martial in time of peace and not in occupied territory.[1]

CONSTITUTIONAL PROVISIONS, EXECUTIVE AGREEMENTS, AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in the Appendix to Appellee's Brief in *Reid* v. *Covert*, No. 701, and will not be repeated here.

The Administrative Agreement with Japan, TIAS 2492, 3 U. S. Treaties 3342, is set forth in pertinent part at pp. 16-25 of the Petitioner's Brief in this case.

STATEMENT

This was a habeas corpus proceeding, brought by the respondent, a retired General of the United States Army, to secure the release of his daughter, Mrs. Dorothy Krueger Smith, who was held in a federal penal institution pursuant to a sentence of life imprisonment imposed on her by an Army court-martial for the killing of her husband.

Mrs. Smith, who now and all her life has been a civilian, was the wife of Colonel Aubrey D. Smith, U. S. Army, and

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[1] A non-constitutional issue was also presented by the respondent in his Memorandum in the Nature of a Cross-Petition, at pp. 2-5. That issue has been abandoned for reasons set forth in Point I below, pp. 8-11.

in October 1952 was living with him and their two minor children in Tokyo, Japan, in quarters furnished by the United States Government, Colonel Smith being assigned to Headquarters Far East Command (R. 1, 7, 23-24). While there she enjoyed the usual amenities furnished by the Army to the dependents of its military personnel (R. 1, 7).

The record discloses that Mrs. Smith had been under psychiatric treatment over a long period, beginning late in 1947 (R. 30-31), and continuing through the spring of 1952 at an Army hospital in Tokyo (R. 29). At that time she was told that the next hospitalization would result in her evacuation for medical reasons (R. 29).

In August and September, 1952, barbiturates and paraldehyde were prescribed for her (R. 30), and early in October, on the day of the homicide, she had been taking paraldehyde (R. 24, 27, 31). On the night of October 3, 1952, she stabbbed her husband with a knife, inflicting wounds from which he died the following day (R. 25-27).

Mrs. Smith was charged with premeditated murder, in violation of Art. 118(1), UCMJ,[2] and was tried by an Army general court-martial in Japan on January 5-10, 1953 (R. 2, 7).[3] She was convicted of the charge, and was sentenced to imprisonment for life (R. 2, 7, 23).

The principal issue at the trial concerned Mrs. Smith's sanity. The members of the sanity board concluded (R. 28-29) that she was able to distinguish right from wrong and to adhere to the right, Brig. Gen. Chambers, Medical Corps, Chief of the Division of Psychiatry and Neurology

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[2] The system of abbreviations used in this brief is identical with that explained in the "Glossary of Military Law Abbreviations" which faces p. 1 of Appellee's Brief in *Reid* v. *Covert*, No. 701.

[3] The complete record of trial was introduced as Respondent's Exhibits 1 and 2 below, see R. 21, and is now lodged with the Clerk of this Court.

in the Surgeon General's Office, considered her unable to adhere to the right, although within the terms of the Army's Technical Manual 8-240, *Psychiatry in Military Law*,[4] her episodes were merely character and behavior disorders (R. 31-32).

An Army Board of Review, acting under Art. 66, UCMJ, affirmed Mrs. Smith's conviction, holding that her condition was not such as to impair her legal responsibility, and denying appellate defense counsel's request for a new psychiatric evaluation (R. 39-43); the Board's opinion (R. 23-47) is reported at 10 CMR 350.[5]

Meanwhile, pursuant to Art. 73, UCMJ, Mrs. Smith had petitioned for a new trial on the basis of newly discovered evidence, viz., the statement of a member of the sanity board to the effect that when he signed the board report (R. 45) "he believed that the conclusions set forth therein met the requirements contained in TM 8-240, *Psychiatry in Military Law;* that if the same questions had been propounded to him in civilian practice, where he was not subject to the limitations imposed by the cited technical manual, he would not have fully concurred in the conclusions reached by the board because, 'from a purely medical point of view,' he was of opinion that the accused was suffering from a mental defect, disease or derangement at the time of the alleged offense, that she was incapable of 'setting out to kill her husband in a calculated, premeditated way,' and that her ability to adhere to the right was impaired."

The Board denied the petition on the ground of failure to exercise due diligence (R. 46).

Thereafter, see R. 47-48, Mrs. Smith's case came before a differently constituted Board of Review (cf. R. 23 with

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[4] Identical with Air Force Manual 160-42, which was in issue in No. 701.

[5] The last few sentences of the opinion are missing from R. 47; they will be found in 10 CMR at 371.

R. 47) for reconsideration, on the basis of further psychiatric examinations conducted at Letterman Army Hospital, as follows:

Three medical officers concluded (R. 48) that, when she stabbed her husband, Mrs. Smith's condition "is estimated to have been such as to markedly impair and diminish her ability to adhere to the right," and that "the accused was not capable of having the degree of intent and willfulness which would constitute premeditation."

Two civilian expert consultants to The Surgeon General of the Army, however, concluded (R. 48) that the accused, at the time of the commission of the offense, was unable to distinguish right from wrong or to adhere to the right. These consultants attributed their differences of opinion with their military colleagues to the effect of Technical Manual 8-240 on the views held by the latter group (R. 49).

The Board of Review reaffirmed the findings and sentence in their entirety (R. 47-51), in an opinion reported at 13 CMR 307.

The Court of Military Appeals, one judge dissenting, likewise affirmed Mrs. Smith's conviction, in opinions (R. 52-94) that are reported at 5 USCMA 314 and 17 CMR 314.

That tribunal rejected (R. 54-70) the rule of *Durham* v. *United States*, 214 F. 2d 862 (D. C. Cir.), deeming itself bound by the tests for insanity set forth in MCM, 1951, ¶120*b*. The Court appeared (R. 68) to have been influenced by the circumstance that, if Mrs. Smith had been adjudged insane by a military acquittal, she could not have been committed to any institution by the military authorities, and (R. 68) that "In truth, the only prospect for her 'treatment' would seem to lie either in voluntary commitment or in a decision by some state to accept her as its ward."

Chief Judge Quinn dissented (R. 91-94), essentially on the ground that (R. 93-94) "the medical experts considered

themselves bound by the manual's terms, to the exclusion of their individual professional beliefs."

The decision of the Court of Military Appeals was handed down on December 30, 1954; the present petition for habeas corpus was filed nearly a year later, on December 9, 1955 (R. 1-4).

Insofar as now material,[6] that petition set forth Mrs. Smith's trial by court-martial, the proceedings on military appellate review, and asked for her release on the ground of the unconstitutionality of Art. 2(11), UCMJ, pursuant to which she was tried: That provision was alleged to violate Article III, Section 2, and the Sixth Amendment, both of which guarantee a jury trial, and to be outside the scope of Article I, Section 8, Clause 14, which, it was said (R. 3), "does not confer power to make rules for the government and regulation of wives of members of the land and naval forces, and does not confer power upon Congress to subject civilians to trial by court-martial in time of peace."

The writ issued (R. 4-5) and petitioner made return (R. 6-9), alleging (R. 7) that Mrs. Smith was a person accompanying the armed forces within the meaning of Arts. 2(10) and 2(11), UCMJ, and that all of the material events occurred in a 'time of war' as that term is used in the Uniform Code. Relator's traverse (R. 10-11) restated the allegations of his petition.

The district court in a written opinion (R. 12-19) upheld the constitutionality of Art. 2(11), saying (R. 19), "Though I reject the contention of counsel for respondent that a civilian in Mrs. Smith's situation is 'part' of the armed forces, nevertheless I cannot say with certainty that the power of Congress to provide for court-martial discipline of these civilians accompanying the armed forces

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[6] Allegations relating to the composition of the court-martial, which are not now pressed, see pp. 8-11, *infra*, are accordingly omitted.

abroad is not necessarily and properly incident to the express power 'to make rules for the government and regulation of the land and naval forces.'" He accordingly discharged the writ and remanded Mrs. Smith to petitioner's custody (R. 19-20).

Respondent filed a prompt notice of appeal (R. 20), which was duly perfected (R. 21). Petitioner then sought and was granted (R. 94) a writ of certiorari prior to judgment in the court of appeals.

SUMMARY OF ARGUMENT

I. Contentions based on the composition of the court-martial that tried Mrs. Smith are formally abandoned, because success thereon will not assure Mrs. Smith's liberty. Were her conviction to be set aside, the military authorities would, as in No. 701, be contending that jurisdiction still exists to retry her in this country. If that question, as now seems quite possible, is not reached in No. 701, then the basic constitutional question will have to be relitigated, perhaps in a forum that will require her once more to exhaust the tedious military appellate process before that question can be determined.

II. Article 2(11), UMCJ, is unconstitutional for the reasons set forth in Appellee's Brief in No. 701. Mrs. Smith's situation is identical with that of Mrs. Covert, since, at the time of her trial by court-martial, American forces were in Japan, not by right of conquest, but with Japan's consent. *Madsen* v. *Kinsella*, 343 U. S. 341, is therefore inapplicable.

III. Petitioner is correct in abandoning the contentions urged by her in the district court under Art. 2(10), UCMJ. On the basis both of the earlier precedents and of the legislative history of the Uniform Code, Tokyo during the hostilities in Korea was not "in the field." The Army recognized that when it sent dependents to Japan and permitted them to remain there, while refusing to send dependents to Korea.

IV. The invocation of the treaty power cannot sustain court-martial jurisdiction in this case either.

Apart from the circumstance that the pleadings in this case (as well as the legislative history of Art. 2(11), and the practice thereunder) show that reference to the treaty power is an afterthought, the terms of the Administrative Agreement with Japan show that all that was intended was a representation that the United States would exercise its military jurisdiction vigorously and in good faith.

To the extent that the Administrative Agreement with Japan is interpreted as conferring on American courts-martial a jurisdiction which they did not have under the power to govern the armed forces, it abridges Mrs. Smith's right to trial by jury, and therefore cannot be given effect, for the obvious reason that the treaty power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

V. To the extent that invocation of the Necessary and Proper Clause brings the matter into the realm of judgment, this case also demonstrates both the lack of necessity and the utter impropriety of subjecting a dependent wife to the treatment that is in fact meted out to her in the course of the court-martial process.

ARGUMENT

I. RESPONDENT FORMALLY ABANDONS ALL CONTENTIONS BASED ON THE COMPOSITION OF THE COURT-MARTIAL THAT TRIED MRS. SMITH

In his petition for habeas corpus (R. 3, ¶13), respondent contended that, assuming the constitutionality of Art. 2(11), UCMJ, the general court-martial that tried Mrs. Smith had no jurisdiction because it was improperly constituted. The same contention was reasserted and briefly argued at pp. 2-5 of respondent's Memorandum in the Nature of a Cross-Petition in this Court.

After searching reappraisal, we are now formally abandoning this point, essentially because, even if respondent were ultimately to prevail thereon, there is no assurance that such success would assure his daughter's liberty.

1. Assuming success on the traditional jurisdictional point, viz., that on habeas corpus "it must appear affirmatively and unequivocally that the court [martial] was legally constituted" (*Runkle* v. *United States*, 122 U. S. 543, 556), Mrs. Smith would be within the continental limits of the United States with her military conviction set aside but with the military charges against her still pending. She would then be in the precise position of Mrs. Covert in No. 701, for, plainly, the continuation of military jurisdiction *vel non* would not be in any different posture whether the conviction were set aside because of error in the composition of the court disclosed on collateral review (this case), or because of error in the conduct of the trial on direct review (No. 701). And, since the Air Force's position that military jurisdiction continued in No. 701 has been espoused, and is now being pressed, by the Solicitor General, it is not to be supposed that the Army in the present case would put forward a less comprehensive view of its powers.

2. Whether, in those circumstances, military jurisdiction attaching under Art. 2(11), UCMJ, would be destroyed, is a question that, considering the jurisdictional infirmity inherent in No. 701 (see the order postponing jurisdiction in that case, 350 U. S. 985, and the briefs therein), may not be reached by this Court in that case.

3. Thus, assuming success on the question of the composition of the court-martial in the present case, respondent would still be obliged to litigate, wherever a custodian of his daughter could be reached with process, the question of the constitutionality of Art. 2(11), UCMJ.

That question has evoked different answers in the lower courts. Two judges in the District of Columbia have held

Art. 2(11) unconstitutional. *Reid* v. *Covert*, No. 701; *Hallahe* v. *Wilson*, Habeas Corpus No. 94-55, D. D. C., McGarraghy, J., decided January 4, 1956. In the Southern District of West Virginia (this case) and in the Southern District of California (*In re Varney*, Civil No. 19257-C, J. M. Carter, J., February 16, 1956), the same provision has been held constitutional. Therefore respondent would be faced with substantial relitigation before his daughter could be freed.

4. Moreover, in the *Varney* case, Judge J. M. Carter held that a civilian tried by court-martial was not entitled to have a petition for writ of habeas corpus even entertained until he had first exhausted all of the appellate remedies prescribed by the Uniform Code of Military Justice. Conclusion of Law II(a). Whatever may be the position of one clearly subject to military law with respect to the exhaustion of all military remedies (cf. *Gusik* v. *Schilder*, 340 U.S. 128), it would seem on principle that a civilian contending for non-amenability to military law has an absolute right to obtain an adjudication of his status the moment that he is detained by the military. But as long as the *Varney* ruling stands (cf. *United States* v. *Chamberlin*, 184 F. 2d 404 (C.A. 7), affirmed by equally divided court, 342 U. S. 845), there is always the possibility that it will be followed elsewhere.

It took Mrs. Smith from January 1953, when her trial commenced (R. 22), until end of December 1954, when the Court of Military Appeals decided the case (R. 52), to exhaust her military remedies. The corresponding period in Mrs. Covert's case (No. 701, R. 12, 97) was somewhat more than two years.

Thus, success on the non-constitutional issue might still require Mrs. Smith to be retried by court-martial, and thereafter force her father to embark on an expensive, time consuming, soul-searing course of litigation before there could be reached the basic constitutional issue which

permeates this case, and in respect of which the Government sought and obtained review by certiorari.

That constitutional issue is not feigned. The parties to this case are not seeking premature decision of a question that may never be reached. The Army has officially determined that, "pending decision by a higher appellate tribunal, the provisions of Article 2(11) will continue to be applied where appropriate," notwithstanding the ruling in the *Covert* case.[7] Respondent is abandoning his non-constitutional point only because his counsel are convinced that he cannot be certain of obtaining an adjudication of his daughter's rights thereunder. To that extent, his private interest joins with the public interest asserted by the petitioner in asking that there be determined the basic and inevitable constitutional issue implicit in this case: May the armed forces in time of peace try dependent wives by court martial?

II. ARTICLE 2(11) OF THE UNIFORM CODE OF MILITARY JUSTICE IS UNCONSTITUTIONAL TO THE EXTENT THAT IT PURPORTS TO AUTHORIZE THE TRIAL OF CIVILIANS BY COURT-MARTIAL IN TIME OF PEACE

Respondent incorporates by reference the contentions that were set forth under the above heading in Point III, pp. 36-91, of Appellee's Brief in No. 701, *Reid* v. *Covert*.

Only a very few words will serve to establish the identity between Mrs. Smith's case and that of Mrs. Covert.

At the time of Colonel Smith's death, American forces were no longer in Japan as military occupants by right of conquest. The Multilateral Treaty of Peace with Japan (TIAS 2490; 3 U. S. Treaties 3169) had become effective on April 28, 1952, and after that date, the United States forces in Japan were there with the consent of Japan, as expressed in the Security Treaty between the two governments (TIAS 2491; 3 U. S. Treaties 3329; Pet. Br. 10-12).

[7] Department of the Army Message 367634, November 25, 1955.

Consequently the status of Mrs. Smith in Japan was precisely the same as that of Mrs. Covert in England, and neither case therefore presents any exercise of the war power or any instance of the military government powers of a court-martial under Art. 18, UCMJ. It follows that *Madsen* v. *Kinsella*, 343 U. S. 341, which was cited by the Court of Military Appeals to sustain military jurisdiction here (R. 52), is completely inapposite. See Point III E, pp. 69-76, of the *Covert* brief.[8]

Petitioner lays some stress (Pet. Br. 8-9) on the circumstances that Mrs. Smith "lived in quarters in the military housing area, used the facilities of the commissary and the post exchange, and took advantage of the privileges afforded her at the dispensary." But these amenities are equally available, at least to the extent that facilities are at hand, for the dependents of every officer of the Army stationed in the United States. Had the Smiths been quartered at Fort Myer, Mrs. Smith would have enjoyed precisely the same emoluments that she is shown to have had in Tokyo. See Department of the Army Pamphlet No. 21-5, *Personal Affairs of Military Personnel and Aid for their Dependents*, 14 April 1954.

There are in this case no other factors under Art. 2(11) that require special mention.

III. PETITIONER IS CORRECT IN ABANDONING THE CONTENTIONS URGED BY HER IN THE DISTRCT COURT UNDER ARTICLE 2(10), UNIFORM CODE OF MILITARY JUSTICE

In her return (R. 7), petitioner asserted that Mrs. Smith was a person accompanying the armed forces within the meaning of Art. 2(10), UCMJ, which subjects to the Code "In time of war, all persons serving with or accompanying an armed force in the field," and also that all events material to Mrs. Smith's case "occurred in a 'time of war' as

[8] If Mrs. Smith had been tried by court-martial during the pendency of the occupation, counsel would assuredly not have commenced the present proceeding.

that term is used in the Uniform Code of Military Justice." Respondent made due denial in par. 1 of his traverse (R. 10).

No question under Art. 2(10) was set up in the Petition for Certiorari herein, and no contentions under Art. 2(10) are made in petitioner's brief on the merits, by incorporation or otherwise. Even a summary review of the authorities suffices to establish the soundness of petitioner's concession in that regard.

1. At the time Mrs. Smith was tried in Japan, as has been seen, American troops were there with Japanese consent and not by virtue of the right of conquest. No general court-martial, therefore, had any vestige of military government power. And the circumstance that Korean hostilities were still in progress did not alter the situation.

The analogy here is that of our own Indian Wars. Those conflicts were similarly undeclared; those conflicts similarly involved fighting and casualties; and so the Indian Wars were real wars. 13 Op. Atty. Gen. 31; 13 Op. Atty. Gen. 470; 13 Op. Atty. Gen. 472. Yet it was uniformly held that the war-time camp-follower jurisdiction could be exercised only in the immediate vicinity of the actual Indian campaigns. See Dig. Op. JAG, 1912, p. 151:

> "LXIII B. The jurisdiction authorized by this article [AW 63 of 1874] can not be extended to civilians employed in connection with the Army *in time of peace* [italics in original, citing 16 Op. Atty. Gen. 13 and 48], nor to civilians employed in such connection during the period of an Indian war, but not on the theater of such war. [Ruling from 1877.] In view of the limited theater of Indian wars, this exceptional jurisdiction is to be extended to civilians, on account of offenses committed during such wars, with even greater caution than in a general war. [Rulings from 1877, 1903, and 1909.]"[9]

[9] The earlier rulings are also in the 1901 Digest, p. 57, ¶165; *id.*, 1895, p. 76, ¶5; *id.*, 1880, p. 19, ¶5.

Winthrop (*136-137; reprint, p. 101) was to the same effect: "In general indeed, the jurisdiction created by the Article [AW 63 of 1874] should be extended with special caution over civilians serving with troops during an *Indian* war, for the reason that the theatre of such a war is commonly restricted in extent and that its duration is ordinarily but brief as compared with other wars."

And "in the field" was interpreted by Attorney General Devens—who had been a general officer during the Civil War—to "imply military operations with a view to an enemy. * * * When an army is engaged in offensive or defensive operations, I think it safe to say that it is an army 'in the field'." 14 Op. Atty. Gen. 22, 23.

Applying the reasoning of the classical exponents of American military law to this case, therefore, it follows that hostilities in Korea—such as they were in January 1953, the date of trial—did not create war-time camp-follower jurisdiction in Tokyo.

2. Under the impact of the emotions engendered in World War I, the older test was abandoned. In April 1918, The Judge Advocate General held that, since an army in the field must be supplied from bases previously established, the Bush Terminal in Brooklyn, New York, was "a part of the line of communication which supply our troops in France," and that accordingly a civilian quartermaster employee there who committed a theft of military stores was subject to trial by court-martial. 2 Op. JAG (1918) 243-245.[19]

On this reasoning the entire country was within the theater of operations and hence "in the field." This wide jurisdiction was in fact exercised, see World War I cases in 4 Bull. JAG. 223-229, and, in two of the three cases that

[19] One of a series of three volumes, from 1917 to 1919, publishing opinions of The Judge Advocate General in full and not merely in digest form.

came before the courts, it was sustained. *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex.) (quartermaster employee on Mexican border); *Hines* v. *Mikell*, 259 Fed. 28 (C. A. 4), certiorari denied, 250 U. S. 654 (auditor in constructing quartermaster's office in South Carolina cantonment); *Ex parte Weitz*, 256 Fed. 58 (D. Mass.) (employee of civilian contractor in Massachusetts cantonment; jurisdiction not sustained). After the war, it was accordingly said that "in the field" included not only the theater of actual hostilities, but also the lines of communication and the reserves and service of supplies under actual military control. Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 116.

3. World War II brought, if not a return to the traditional view, at least a sharply restricted exercise of military jurisdiction over civilians at military installations in the United States, see World War II cases noted in 4 Bull. JAG 223-229, and in nearly four years of war only two cases involving trials of civilians serving with the Army for offenses committed in the United States reached the courts. Jurisdiction was sustained where the individual was a cook embarked on a transport about to sail from Hampton Roads to the war zone (*McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E. D. Va.)), and denied where the individual was a civilian engineer employee in the Canal Zone (*Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980 (D. C. Z.)).

The case of *In re Berue*, 54 F. Supp. 252 (S. D. Ohio), which in fact involved an offense committed on the high seas on board a ship carrying supplies for the Army, contained at p. 255 a discussion of "in the field" which the drafters of the Uniform Code adopted. Here is what both Committees said, citing that page (H. R. Rep. 491, p. 11; S. Rep. 486, p. 7; both 81st Cong., 1st sess.):

> "The phrase 'in the field' has been construed to refer to any place, whether on land or water, apart

from permanent cantonments or fortifications, where military operations are being conducted."

Under this return to General Devens' 1872 definition, *supra*, p. 14, it is plain that Tokyo at the time of Mrs. Smith's trial was not within Art. 2(10) since no military operations were being conducted there.

4. Granting that hostilities in Korea constituted a "war" for purposes of misconduct in combat (*United States* v. *Bancroft*, 3 USCMA 3, 11 CMR 3) or for purposes of the statute of limitations (*United States* v. *Ayers*, 4 USCMA 220, 15 CMR 220), it still does not follow that Tokyo in January 1953 was "in the field"—and unless it was, Art. 2(10) has no application, no more than the old pre-1916 Articles of War did. See authorities collected at pp. 43-47 of the *Covert* brief.

5. It is matter probably within the realm of judicial notice (see *Clark* v. *United States*, 99 U. S. 493, 495) that, after the commencement of hostilities in Korea in June, 1950, dependents were not sent beyond Japan. As a matter of fact dependents are not being sent to Korea even now.[11] Korea in June 1950 and until the Armistice became effective in the summer of 1953 was undoubtedly "in the field." Possibly some of Southern Korea was not. But for present purposes the short answer is that, if the Army had considered Japan to have been "in the field" in 1952 and 1953, it would neither have transported Mrs. Smith there nor suffered her to remain. In fact, Japan was no more "in the field" than were the Ports of Embarkation on the West Coast, or, for that matter, The Pentagon—and the Army's policy on dependents reflected that circumstance.

Petitioner was accordingly well advised to abandon her Art. 2(10) contentions.

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[11] Information obtained from the Office of the Deputy Chief of Staff for Personnel, Department of the Army, in April 1956.

IV. THE INVOCATION OF THE TREATY POWER CANNOT SUSTAIN COURT-MARTIAL JURISDICTION OVER A DEPENDENT WIFE IN THIS CASE EITHER

In No. 701, it was pointed out on behalf of Mrs. Covert that the treaty power was completely irrelevant to that case, in part because neither the British statute there relied on nor the exchange of notes which it implemented purported in any way to enlarge the jurisdiction of American courts-martial, and because no treaty or agreement could possibly authorize the trial of a civilian by court-martial in the District of Columbia. Appellee's brief, Point IV, pp. 92-102.

Here the situation is somewhat varied. A different agreement is involved, and Mrs. Smith was tried on Japanese soil. But, even so, the treaty power does not and cannot sustain court-martial jurisdiction over her.

A. The invocation of the treaty power is an afterthought.

Petitioner's return (R. 6-9) sets up simply Arts. 2(10) and 2(11), UCMJ. It does not make any reference whatever to the Administrative Agreement with Japan (Pet. Br. 10-12). Petitioner as well as the civilian and military counsel who represented her in the district court (R. 8, 12) regarded the present case as one involving simply an exercise of the power to govern and regulate the armed forces.

That view was in entire conformity both with the legislative history of Art. 2(11) and with the practice thereunder. See pages 93-97 of Appellee's Brief in No. 701, which are incorporated by reference, and to which the Court is respectfully referred.

Examination of the treaty materials now put forward will demonstrate that the position taken by petitioner's counsel below did not involve either oversight or any dereliction of professional duty. They were well advised not to invoke the treaty power.

B. The Administrative Agreement with Japan, fairly construed, cannot be read as conferring on American courts-martial any jurisdiction which, but for that agreement, they would not have had.

It is plain that, by Article XVII(2) of the Administrative Agreement with Japan (Pet. Br. 20-21), it was agreed that "the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality."

It is likewise plain (Art. I(e)(1); Pet. Br. 17) that Mrs. Smith was a "dependent" within the meaning of the Agreement.

Up to this point, all rests on assumption—the assumption that the Art. 2(11) jurisdiction is within powers constitutionally granted to American courts-martial. Since, under the present heading, petitioner is endeavoring to supply through the treaty power a jurisdiction that the court-martial power alone does not authorize, her proposition up to this point resembles that of the appellant in No. 701.

But petitioner in this case has something more. Art. XVII(4) of the Administrative Agreement goes on to provide (Pet. Br. 23) that:

> "4. The United States undertakes that the United States service courts and authorities shall be willing and able to try and, on conviction, to punish all offenses against the laws of Japan which members of the United States armed forces, civilian component, and their dependents may be alleged on sufficient evidence to have committed in Japan, and to investigate and deal appropriately with any alleged offense committed by members of the United States armed forces, the civilian component, and their dependents, which may be brought to their notice by Japanese authorities or which they may find to have taken place * * *."

This amounts on its face to a representation by Messrs. Dean Rusk and Earl Johnson, who signed the Administrative Agreement on behalf of the United States (3 U. S. Treaties at 3362), that American courts martial have power to try dependent wives and, necessarily, that Art. 2(11), UCMJ, is constitutional.

If that provision is held to be a constitutional exercise of the Clause 14 power to govern the armed forces, then no inquiry under the treaty power is necessary. But if the holding under Clause 14 should be the other way, then there is sharply posed the question as to the effect of this representation, which, under such a holding, is necessarily a mistaken representation: The service courts were willing—indeed, even eager—but they were not constitutionally able to try dependent wives in time of peace.

Thus there is presented the problem of the effect of mistakes in treaties.

In ordinary contractual dealings, a mutual mistake prevents formation of a contract. If one merchant makes a proposal dealing with a ship named *Peerless*, and the other merchant, purporting to accept that proposal, is in fact thinking of another ship of the same name, there is no meeting of the minds and hence no contract. *Raffles v. Wichelhaus*, 2 Hurl. & C. 906; see 1 Williston, *Contracts* (rev. ed.) § 95.

Is the situation different when the contracting parties are independent sovereign nations? Where the mistake is one of fact, the situation is the same. "Nearly all writers on international law who have discussed the essential conditions of a valid treaty lay down the proposition that a treaty entered into with reference to an assumed state of facts which is subsequently found to have no existence, is either void or voidable at the will of a party, because in such a case a treaty does not express the real will of the parties." Harvard Research in International Law, *Draft*

Convention on the Law of Treaties, 29 Am. J. Int. L. Supp. 1126.

To the extent, therefore, that Art. XVII(4) of the Administrative Agreement reflects a mistake of fact on the part of the signatories, it cannot, plainly enough, be given effect according to its terms.

Suppose, however, that the mistake is one of law. Then (*id.* at 1129), "Writers on international law are in general agreement that errors of law do not have the same juridical effect as is produced by errors of fact, and that international law does not recognize that states may take advantage of their ignorance of the law to free themselves from treaty obligations resulting from such ignorance."

So far as Japan was concerned, any mistake as to American law was a mistake of foreign law. By our standards, that would be, on familiar principles, a question of fact. We need not pursue the interesting inquiry thus posed, for the reason that, so far as Japan is concerned, the United States has in fact performed its obligation under Art. XVII(4). It tried Mrs. Smith, it convicted her, and up to now it has punished her by more than three years of confinement.

So, as applied to the present case, the question now presented is whether Messrs. Rusk and Johnson undertook, by representing in the Administrative Agreement that an American court-martial could try a civilian dependent in time of peace, to confer on such a court-martial powers which, but for that agreement, it did not have.

We think that they did not. Their representation was based on the statute book, and on the assumption that they were justified in taking it at full face value. They were dealing, actually, in terms of assumptions. Fairly read, it is not possible to draw from Art. XVII(4) of the Administrative Agreement any intention to enlarge or to add to jurisdiction. What was meant, and what the parties

understood, was that the American military authorities would proceed, fairly and vigorously, to try and to punish all American wrongdoers who fell within the literal terms of the Administrative Agreement, and that the American military authorities would not, under color of the exclusive jurisdiction which that Agreement gave them, simply turn such persons loose because their victims happened to be nationals of the former enemy.

Essentially, therefore, Art. XVII(4) was a representation that, so far as the United States was concerned, the jurisdiction conferred by Congress in Art. 2(11), UCMJ, would be exercised in good faith.

Fairly read in the light of the circumstances then obtaining, Art. XVII(4) was not, and was not intended as, a representation of the constitutional validity of Art. 2(11). Having in mind the assumptions of everyone in Congress in 1949 and 1950, when that provision was being enacted, that Art. 2(11) was constitutional, Art. XVII(4) of the Administrative Agreement did not represent any effort to assert, through the machinery of international negotiation, a power not conferred on the United States by its own Constitution.

C. No executive agreement could render triable by court-martial a civilian who, but for such agreement, would have been entitled to a trial by jury.

But, if, contrary to its language and to its background, Art. XVII(4) can be stretched farther, to limits that were not in the parties' minds, then a further and indeed insuperable obstacle stands in the way of the effect now claimed for it by the petitioner.

For at this juncture, petitioner's proposition necessarily is that, although court-martial jurisdiction over dependent wives cannot be justified by anything in the power to govern or regulate the armed forces, it can still be supported on the basis that American diplomats represented in an executive agreement concluded with a foreign nation

that courts-martial of the United States had such powers. Or, otherwise stated, although, but for the Administrative Agreement, Mrs. Smith enjoyed the right to a trial by jury that is guaranteed by Article III, Section 2, and again by the Sixth Amendment, she was, once that Agreement went into effect, subject to trial by court-martial.

This is not overstating petitioner's position. If the asserted jurisdiction to try Mrs. Smith by court-martial can be sustained under Clause 14, there is no need to invoke the treaty power. If it cannot be sustained under Clause 14, then the treaty power is being relied on to abridge Mrs. Smith's right to a jury trial.

The short answer is that it cannot be so used. For the treaty power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

In this position, we are on common ground with the present Solicitor General, who, only at the last Term, urged those precise limitations upon the treaty power and the power to conclude executive agreements. He said in *United States* v. *Capps*, 348 U. S. 296 (U. S. Br., No. 14, Oct. T. 1954, pp. 32, 49):

> "The basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights, which govern all exercise of governmental authority in this country.
>
> * * * * *
>
> "Together with statutes and treaties, executive agreements are subject to the Bill of Rights and the other clauses of the Constitution which protect all Americans from the excesses of official authority."

We heartily agree, and we submit that adherence to those propositions, which are far too basic to change direction from Term to Term with each passing case, requires

rejection of any contentions now advanced that are based upon an exercise of the treaty power.

V. TO THE EXTENT THAT PETITIONER'S INVOCATION OF THE NECESSARY AND PROPER CLAUSE BRINGS THE MATTER INTO THE REALM OF JUDGMENT, EXAMINATION OF THE REALITIES OF TRIAL BY COURT-MARTIAL DEMONSTRATES THAT THE PRINCIPLE OF "THE LEAST POSSIBLE POWER ADEQUATE TO THE END PROPOSED" IS ONE PREEMINENTLY APPLICABLE TO THE SCOPE OF THE MILITARY JURISDICTION

What was said under this heading in Appellee's Brief in No. 701, Point V, pp. 102-122, is fully applicable here, and is accordingly incorporated by reference.

Only a few words need to be added.

This case, like that of Mrs. Covert, makes but a poor advertisement for the extension of court-martial jurisdiction over dependent wives. It is not necessary to go to the unprinted transcript of the proceedings before the court-martial; examination of the military appellate opinions (R. 23-94) will suffice.

Here a distraught woman, who for nearly five years preceding the incident out of which these proceedings arose had been under continuous psychiatric treatment (R. 30-31, 29) was advised by the Army's medical authorities that one more hospitalization would cause her to be sent home and separated from her husband (R. 29). So she stayed away from the hospital, relied on the drugs that were prescribed for her on an out-patient basis (R. 24, 30), and, at a time when she was—at the very least—on the border line of sanity, her emotions gave way with fatal results.

At the trial level, her legal responsibility was determined, certainly in large measure, on the basis of a Technical Manual issued to the service "By order of the Secretaries of the Army and the Air Force." TM 8-240, p. ii; see the first Board of Review opinion, R. 39-43.

When military doctors on further examination arrived at a conclusion respecting her mental condition which was

more favorable to her, that conclusion was, in fairly summary fashion, brushed aside. See the second Board of Review opinion, R. 47-51. And when her case came before the highest military appellate agency, the Court of Military Appeals, only one judge there was able to find vitiating unfairness in the proceedings by reason of testimonial compulsion. Quinn, C. J., dissenting at R. 91-94.

We do not seek to reexamine or to relitigate either the issue of Mrs. Smith's sanity or the issue of whether the terms of TM 8-240 in fact improperly influenced the witnesses' testimony.

We simply ask, is it "Necessary" (Clause 18, Section 8, Article 1) to the undoubted disciplinary needs of the Army that any woman, whose only connection with the service rests on her marriage to one of its officers, be subjected to such a course of treatment? We also ask, is it "Proper" in a constitutional sense—or otherwise—that any civilian woman be thus pushed around?

CONCLUSION

The judgment of the district court should be reversed, with instructions to discharge Mrs. Dorothy Krueger Smith from petitioner's custody forthwith.

Respectfully submitted.

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